USDOL Publishes "Independent Contractor" Interpretation

Insights
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The U.S. Labor Department's Wage and Hour Division has released "Administrator's Interpretation No. 2015-1" to address what it characterizes as the "problematic trend" of allegedly misclassifying workers as independent contractors rather than as employees for purposes of the federal Fair Labor Standards Act. This development was of course anticipated in light of last month's remarks by the Division's Administrator, Dr. David Weil.

In explaining why the agency concluded that such guidance is needed, the Interpretation enumerates a now-familiar list of the consequences resulting from "misclassification" where the FLSA is concerned, including a failure to pay non-exempt employees at least the FLSA-required minimum wage and/or overtime compensation due for all hours worked in a workweek. The Interpretation's asserted aim is to curtail the perceived misclassification phenomenon by clarifying how the standard for determining whether an individual is an FLSA "employee" can help the "regulated community" classify workers correctly.

Emphasizes Economic Dependency

The guidance does not create a new test for determining whether an individual is an employee or an independent contractor (and even if it did, this would not have the force of law). Neither does the Interpretation propose to add to the six factors courts and USDOL have tended to consider in evaluating the issue. The document offers some factor-by-factor elaboration upon how each of them should be applied and includes illustrative examples.

But USDOL's overarching thrust is to contend more generally that the multi-factor "economic realities" analysis used by the courts should be applied in a broad manner so as to lead to what appears to be USDOL's preferred conclusion: That "most workers are employees under the FLSA." In this regard, the Interpretation's introductory comments are perhaps its most interesting aspect.

For example, USDOL implicitly de-emphasizes the role of individual factors under the economic-realities test in favor of ultimately making a higher-level judgment as to whether the individual is economically dependent upon the putative employer. In particular, the guidance repeatedly admonishes against giving too much weight to "the degree of control exercised or retained by the employer". The agency clearly feels that focusing on "control" is too likely to lead to USDOL's *disfavored* conclusion: That particular workers are *not* FLSA employees.

The Bottom Line

Regular readers know from earlier posts that it has been a longstanding USDOL priority to crack-down on "misclassification" in the independent-contractor arena. Against that background, neither the publication of this Administrator's Interpretation nor the views it expresses should come as a surprise.

It is entirely possible that this development will turn out to be a harbinger of both renewed USDOL enforcement activity in this area and more-numerous FLSA lawsuits. And while courts are not required to adopt USDOL's position, they might well come to embrace what the Interpretation has to say.

As we have urged in the past, organizations whose operating models are built even in part upon "contractors", "contract labor", "freelancers", "contract employees", or independent contractors by any other name should immediately evaluate what the prospects are that such workers would be deemed to be true independent contractors under the FLSA. Obviously, this assessment should take the Interpretation's contents into account.

Related People

Ted Boehm
Partner
404.240.4286
Email